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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 485

GABRIEL TOOMBS, APPELLANT,

vs.

CITIZENS BANK OF WAYNESBORO

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

FILED NOVEMBER 18, 1929

(34,616)

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SUPREME COURT OF THE UNITED STATES

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[fols. a & 1]

IN SUPREME COURT OF GEORGIA

ORDER ALLOWING APPEAL—Filed Oct. 17, 1929

On reading the above and foregoing petition for appeal of Gabriel Toombs and consideration of the assignment of errors presented therewith it is ordered that the appeal as prayed for be and is hereby allowed. And it appearing to the court that a citation was duly served as provided by law it is ordered said Gabriel Toombs shall give bond with [fols. 2 & 3] good security in the sum of fifteen hundred dollars ($1500.00) and upon the filing of such bond with the clerk of the Supreme Court of Georgia this appeal shall operate as a supersedeas. Said bond in said sum of fifteen hundred dollars ($1500.00) shall cover the bond for costs.

This 15th day of October, 1929.

Richard B. Russell, Chief Justice Supreme Court of Georgia.

[File endorsement omitted]

[fol. 4] IN SUPREME COURT OF GEORGIA, OCTOBER TERM, 1928

No. 6876

GABRIEL TOOMBS, Appellant,

vs.

CITIZENS BANK OF WAYNESBORO, Appellee

ASSIGNMENTS OF ERROR—Filed Oct. 17, 1929

Now comes the appellant, Gabriel Toombs, by his attorney, W. A. Slaton, and in connection with his petition for appeal says that in the record proceedings and in the final decree aforesaid manifest error has intervened to the prejudice of appellant, to wit:

1. The court erred in not holding that sections 1, 2, and 3 or article 6 of the act of August 16, 1919, creating the department of banking (Acts 1919, pp. 135, 152) as amended by the act of August 26, 1925 (Acts 1925, pp. 119, 126) were unconstitutional and void because they violate the due process clauses of the State and Federal constitutions to wit, the fourteenth amendment to the constitution of the United States, because said sections do not provide for notice to be given to each stockholder of the special meeting of stockholders at which assessments provided for in said sections of said statutes are required to be made.

2. The court erred in holding that sections 1, 2, and 3, of article VI of the act of August 16, 1919, creating the department of banking (Acts 1919, pp. 135, 152) as amended by the act of August 26, 1925 (Acts 1925, pp. 119, 126) were constitutional and valid, and did not contravene the provisions of the fourteenth amendment to the constitution of the United States, by denying to appellant Gabriel Toombs due process of law, because at the time said Gabriel Toombs acquired his stock in Citizens Bank of Waynesboro, the only provision of the laws of Georgia which authorized an assessment by stockholders upon themselves being the provisions of the act of December 16, 1895 which provided that upon a determination by the State bank examiner that the capital stock of a bank was impaired, the bank should be required [fol. 5] to levy an assessment to restore its capital, and the only penalty provided by said statute being that on the failure to levy such assessment, the Governor should proceed to forfeit the charter of said bank, and by the act of August 16, 1919 (Acts 1919, pp. 132, 152) as amended by the act of August 26, 1925 (Acts 1925, pp. 119, 126) the General Assembly of Georgia having provided that upon a determination by the superintendent of banks that the capital of a bank had been impaired as much as ten per cent. the officers of said bank should call a meeting of the stockholders of said bank, at which special meeting a quorum should consist of a majority only of the stock outstanding, and under said statute a majority of the quorum present, at such meeting, which majority of such quorum might be a minority of the total stock outstanding, was authorized by their vote to levy an assessment on all the stockholders, and

after the levy of such assessment, said bank being authorized at its option to sue the stockholder for the full amount of said assessment, recover a judgment therefor and subject all of the property of the stockholder against whom such assessment had been levied to the payment of the same was a denial of due process of law to the appellant Gabriel Toombs, because the special meeting of stockholders so provided for was in effect a judicial tribunal erected by the State for the purpose of exercising the judicial and discretionary act of determining whether such assessment should be levied and the bank continued in operation or should not be levied and the bank liquidated as an insolvent bank, and said statutes having made no provision whatever for notice to all the stockholders of said bank so that each stockholder as the result of such notice might attend such meeting and be heard on the question whether or not such assessment was provident or improvident, and said statutes providing that a minority of the stockholders might be authorized to levy such assessment without notice to all the [fols. 5½-7] stockholders was and is in violation of the provisions of the fourteenth amendment to the constitution of the United States by denying to the stockholders not required to be notified the due process of law which would arise from notice of such meeting.

3. The court erred in holding that the capital of said bank having been impaired $55,422.76, and in order to make an assessment sufficient to restore the capital of said bank creditors and depositors were required to write off of their claims the sum of $30,422.76, so that a levy of an assessment of 100% would restore said capital, the levy of such assessment under the facts of this case was a valid and binding and provident exercise of the power granted to a minority of the stockholders, without requiring notice to all the stockholders.

Wherefore appellant prays that said judgment of the Supreme Court of Georgia may be reversed.

W. A. Slaton, Attorney for Appellant.

[File endorsement omitted]

[fol. 8] In Superior Court of Wilkes County, May Term, 1928

No. 20

Citizens Bank of Waynesboro

vs.

Gabriel Toombs

Suit on Assessment Against Stockholders

Petition

Citizens Bank of Waynesboro, as plaintiff, brings this complaint against Gabriel Toombs, as defendant, and alleges:

1

That defendant is a resident of said county.

2

That defendant is a stockholder in plaintiff bank being the holder of Certificate No. 82 for five shares of capital stock of said bank of the par value of $100.00 per share; and Certificate No. 86 for one share of stock of the par value of $100.00, making a total of six shares of stock of the value of $600.00 par.

3

That on or about August 16th, 1926, the capital stock of said bank having become impaired, said bank was taken in charge by the State Superintendent of Banks and an appraisal of the assets and liabilities of said plaintiff bank disclosed the fact that it would be necessary to issue against its stockholders an assessment of 100 per cent.

4

That under the Act of August 26th, 1925, Article VI, Section 1 of the Banking Act of Georgia, the State Superintendent of Banks notified such bank and required such bank to make good its capital stock by an assessment upon the stockholders of said bank and acting under these in-

structions a special meeting of the stockholders of said plaintiff bank was called and held upon the 23rd day of October, 1926.

5

At such special meeting of said stockholders a majority [fol. 9] of the stock outstanding at the time was represented and the following resolution unanimously passed, to-wit:

A special meeting the stockholders of the Citizens Bank of Waynesboro, Georgia, was held this October 23rd, 1926.

Upon roll call the following stock was found to be present either in person or by proxy:

J. H. Whitehead	10 shares.
J. L. Boyd	2 shares.
H. W. Blount	2 shares.
Jno. A. Blount	2 shares.
Estate R. C. Neely	120 shares.

A majority of the stock being present this meeting was declared ready for business.

Mr. R. C. Neely, Jr., was elected Chairman and H. W. Blount Secretary.

The following resolution was introduced by Mr. Neely:

"Whereas the Citizens Bank was placed in the hands of the Superintendent of Banks on August 16th, 1926, and

Whereas an appraisal of the assets of the Citizens Bank disclosed a deficiency of assets to pay its liabilities of $55,422.76, and,

Whereas, it appears that certain depositors have contributed the sum of $30,422.76 to cover said impairment, leaving the capital stock of the Citizens Bank impaired to the extent of $25,000.00;

Now, therefore, to make good the impairment of the capital stock.

Be it resolved that under the provisions of Article VI, Section 1 of the Banking Law of the State of Georgia approved August 16, 1919, an assessment of 100% par value of stock held by each stockholder be, and the same hereby is made to make good said impairment of capital stock."

On motion of Jno. A. Blount and duly seconded the above [fol. 10] resolution was unanimously adopted.

There being no further business the meeting adjourned.

(Signed) R. C. Neely, Jr., Chm. H. W. Blount, Secy.

That said defendant, as a stockholder in said bank has failed and refused to pay the assessment which has been levied against him as aforesaid, after due notice to him as by statute required and said plaintiff bank now elects under Section 2 of Article VI of the Banking Laws of said State passed August 26th, 1926, to sue said stockholders for the full amount of said assessment, to-wit, the sum of $600.00, said assessment of 100 per cent having become absolutely necessary under the law for the purpose of making good the impairment of the stock of plaintiff bank.

Wherefore, petitioner prays that process issue, and that said defendant be served and that he be required to appear at next term of said court and answer this complaint, and that petitioner have judgment against said defendant in the principal sum of $600.00, together with interest and cost, as is provided by law.

Earle Norman, Attorney for Petitioner.

[fol. 11] In Superior Court of Wilkes County

[Title omitted]

Answer

And now comes the defendant in the above stated case and subject to his demurrer therein of file, for answer says:

1. Defendant denies the allegation of paragraph one of plaintiff's petition that he is a resident of said State and County, and says that he is and from the first day of September 1925 has been a citizen and resident of the City of Tampa in the State of Florida. This defendant does however admit the jurisdiction of this court over this defendant by reason of the acknowledgment of service by authority of this defendant, and that this court could with-

out such acknowledgment of service acquire jurisdiction of this defendant by attachment against the property of this defendant located in said county.

2. Defendant admits the allegations of paragraphs Two (2) Three (3) Four (4) Five (5) of plaintiff's petition.

3. Defendant denies the allegations of paragraph six (6) of plaintiff's petition.

4. For further plea and answer to plaintiff's petition, this defendant says that T. R. Bennett, State Superintendent of Banks, on or about August 16, 1926, took charge of plaintiff bank, that on or about Sept. 16, 1926 an assessment was levied against stockholders in said bank in the sum of 100% of the par value of said stock, that a number of the stockholders in said bank actually paid these assessment-, that executions were issued by said Superintendent of Banks against those stockholders who did not pay, and on or about the 22nd day of October, 1926, said Superintendent of Banks cancelled said assessments, returned to the drawers the checks delivered in payment of [fol. 12] such assessments, and returned the assets of said bank to the officers of said bank, and by reason of such acts this defendant is not liable to plaintiff bank for the assessment here sued for.

5. For further plea and answer this defendant says that plaintiff bank was chartered, prior to January 1, 1920, under the provisions of the Civil Code by the Secretary of State of said State, that the stockholders liability to creditors and depositors under the charter of plaintiff bank of this defendant as a stockholder in said bank was fixed and determined by section 2270 of the Civil Code of 1910, in the following language to wit: "and said stockholder shall be further and additionally liable equally and ratably and not one for another as sureties to depositors of said corporation for all moneys deposited therein in an amount equal to the face value of their stock," which said section of the Code of 1910, this defendant says was repealed by reason of the adoption of an act of the General Assembly of said State approved August 16, 1919, known as the General Banking Law, which appears in Published Laws 1919 on pages 135 et seq., and said statutory liability being so

repealed, and no other or further liability of stockholders having been provided by law, this defendant is not liable to the depositors or creditors of plaintiff bank in any sum or in any manner, and plaintiff is not entitled to recover in said action any sum.

6. For further plea and answer this defendant says that plaintiff undertakes in its petition to set forth a cause of action arising under the provisions of Sections 1, 2 and 3 of Article VI of an act of the General Assembly of Georgia approved August 16, 1919, known as the General Banking Law, as amended by subsequent acts of the General Assembly, that this defendant is a non-resident of said State, [fol. 13] and a resident of the State of Florida and was a resident of the State of Florida at the time the alleged assessment was made; that this defendant was not present and did not participate in the levy of said assessment; that the statutes under which plaintiff undertakes to proceed provide for no notice to this defendant, they provide for no opportunity for this defendant to be heard on the question whether such assessment shall be levied, and said statutes failing to provide for notice and an opportunity to be heard violate the provisions of paragraph three (3) of Section one (1) of Article one (1) of the Constitution of this State and of the fourteenth amendment to the Constitution of the United States by denying to this defendant due process of law.

Wherefore defendant prays that he be hence dismissed with his reasonable costs and damages.

W. A. Slaton, Counsel for Defendant.

[fol. 14] In Superior Court of Wilkes County

Judgment—Oct. 9, 1928

The within stated case was submitted to the Court on July 28, 1928, under an agreed statement of facts, for decision without the intervention of a jury—an order to that effect having been passed at the regular May Term 1928 of the Superior Court of Wilkes County—and I reserved my decision till this date.

It is considered, ordered and adjudged by the Court that the plaintiff, Citizens Bank of Waynesboro, do have and recover of the defendant, Gabriel Toombs, the sum of $600.00 principal, together with interest thereon at the rate of 7% per annum, from Oct. 23, 1926, to the date of this judgment and future interest on the principal at the same rate, and the further sum of — Dollars as cost of court.

This the 9th day of Oct. 1928.

C. J. Perryman, J. S. C. T. C.

[fol. 15] In Superior Court of Wilkes County

[Title omitted]

Demurrer

And now comes the defendant in the above stated case and demurs to plaintiff's petition therein of file and for grounds of such demurrer says:

1. That no cause of action is set forth in plaintiff s petition.

2. That plaintiff is not entitled to a personal judgment against this defendant because by reason of the provisions of Article VI Sec. 3. of the Banking Act of 1919, appearing on page 153 of the Published Laws of Georgia, 1919, the remedy of plaintiff is limited for the enforcement of the assessment sued for to a sale of a sufficient portion of the stock held and owned by this defendant to pay said assessment, and plaintiff is not entitled to a personal judgment against this defendant.

3. Because to enforce the cause of action sought to be alleged and set out in plaintiff's petition would be in violation of the provisions of Paragraph 3 of Section 1 of Article 1 of the Constitution of this State because to permit the recovery of a personal judgment against this defendant would be to deprive this defendant of his property without due process of law, this defendant not having participated in, agreed to, or been permitted an opportunity to contest the levy of said assessment before or at the time the same was made.

4. Because to enforce the cause of action sought to be set out in plaintiff's petition would be in violation of the provisions of paragraph 1, of section 3 of Article 1 of the Constitution of this State, because to permit the recovery of a personal judgment against this defendant would be to take the private property of this defendant for public purposes without just and adequate compensation being first paid.

[fol. 16] 5. Because the personal liability of this defendant as a stockholder in said bank being limited to an assessment by the Superintendent of Banks not exceeding 100% of the stock held by this defendant, to permit the collection of the assessment here sued for, would be to double the assessment for which this defendant is legally liable, and in the event plaintiff bank was unsuccessful in its efforts to continue its business, this defendant would be liable for the additional assessment by the State Superintendent of Banks in an amount equal to 100% of the par value of the stock held by him, which said additional liability is not a liability imposed on this defendant by the laws of said state.

6. Because sections one (1) two (2) and three (3) of Article VI of the act of 1919, approved Aug. 16, 1919, known as the General Banking Law, as they appear on pages 152 and 153 of Published Laws 1919, as amended by an act approved Aug. —, 1925, and appearing on pages 119, 126, 127 and 128, Published Laws 1925, under which said laws the cause of action set forth in plaintiff's petition is sought to be maintained are unconstitutional and void, in that they contravene the provisions of paragraph three of section one of article one of the constitution of this state and the fourteenth amendment to the Constitution of the United Sates in that said acts deprive this defendant of his property without due process of law because said laws by providing that a majority of the outstanding capital stock of the corporation may hold a valid meeting for the purpose of making an assessment against all the stockholders, and at such special meeting of stockholders, *and at such special meeting of stockholders* a majority of the stock present and voting may levy such a ssessment, against stockholders present and against stockholders not present, in effect pro-

vides that a minority of the stock in said bank may levy such assessment, and because said laws provide for no no-
[fol. 17] tice to stockholders and provide for no hearing either before the stockholders meeting or the officers of said bank and for no legal determination of the necessity for or wisdom of such assessment and stockholders who are not present and voting at such meeting are provided no remedy against an illegal or improvident assessment in any tribunal, and because said statutes provide for no notice of any kind to this defendant, and for no hearing by him and provide for no remedy to this defendant against an improvement and an illegal assessment, no due process of law for determination the rights of this defendant, said acts are unconstitutional, null and void.

7. Because, it appearing from plaintiff's petition that on or about August 16th 1926, the State Superintendent of Banks took charge of plaintiff bank under the statute in such case made and provided because the capital stock of said bank had become impaired to the extent of 100% of said capital stock, and the legal liability of this defendant established under section 2770 of the Civil Code 1910 or under Section 1 of Article XVIII of the Banking Act of 1919, as the same appears in Published Acts 1919 on page 189, whichever act may apply, being limited to 100% of the par value of the stock held and owned by this defendant, upon the taking charge of said bank by said State Superintendent of Banks, the return of said bank to the stockholders and the assessment of this defendant by the stockholders was illegal and without authority of law, because the only remedy against this defendant and for which this defendant was liable to respond was the assessment by the State Superintendent of Banks, and the stockholders from and after that time had no right or authority to levy any assessment against this defendant.

8. Because, it appearing from the allegations of plaintiff's petition that the capital stock of plaintiff bank was
[fol. 18] $25,000.00 that the impairment of the capital of plaintiff bank equaled $55,422.75, and that the difference between said deficiency and the maximum assessment permitted by law was made up by a writing off and discharge of a part of the indebtedness due depositors, the only

remedy provided by law was an administration of the assets of said bank by the State Superintendent of Banks, and plaintiff Bank could not by so procuring the writing off of its liabilities assess against this defendant the liability sought to be imposed by this assessment, this defendant's liability to creditors being limited by law to 100% of the par value of the stock held by him, and by the process pursued by plaintiff bank his liability being increased to 200% of the par value of such stock.

Wherefore defendant prays that he — so hence discharged with his reasonable costs and damages.

W. A. Slaton, Counsel for Defendant.

[fols. 19 & 20] In Superior Court of Wilkes County

Order Overruling Demurrer

TLe within demurrer came on regularly to be heard before me, on July 28, 1928, a previous order to that effect having been passed at the regular May Term 1928, of the Superior Court of Wilkes County, and I reserved my decision till this date.

It is considered, ordered and adjudged by the Court that said demurrer be, and the same is hereby, overruled on each and every ground thereof.

This the 9th day of October 1928.

C. J. Perryman, J. S. C. T. C.

[fol. 21] In Superior Court of Wilkes County

Bill of Exceptions—Filed Oct. 16, 1928; in Supreme Court, Oct. 19, 1928

State of Georgia,
Wilkes County:

Be it remembered, that heretofore, to wit, on the 28th day of July, 1928, in pursuance of an order taken at the regular May Term 1928 of the Superior Court of Wilkes County,

there came on to be heard before the Honorable C. J. Perryman, Judge of said Court, in vacation, without the intervention of a jury, with authority to hear and determine all questions of law and of fact a cause wherein Citizens Bank of Waynesboro was plaintiff and Gabriel Toombs was defendant, the same being a suit upon a stockholders assessment made by the stockholders of said bank against said Toombs as one of the stockholders, which said cause having been submitted to the court, his decision was reserved until the 9th day of October 1928, on which day a judgment was rendered by the court overruling defendant's demurrer to plaintiff's petition overruling said demurrer on each and every ground thereof, to which said judgment of the court overruling said demurrer defendant excepted, excepts, and now assigns the same as error and for grounds of such error says that said judgment of the court is contrary to law and the court erred in overruling said demurrer upon each and every of the grounds of said demurrer therein set forth.

At the same time and place, the following agreed statement of facts was submitted to the court, to wit:

AGREED STATEMENT OF FACTS

Citizens Bank of Waynesboro was incorporated under the General Banking Law, prior to January 1, 1920, Toombs was the owner of six shares of stock of the par value of $600.00, on August 16, 1926, Toombs was, and is now a resident of the city of Tampa, in the State of Florida, having removed there from Washington Ga., and on that date the bank having become insolvent, was taken charge of by T. R. Bennett, State Superir. endent of Banks, who promptly levied an assessment of 100% on the stockholders. [fol. 22] The capital stock of the bank was $25,000, and the impairment of the capital amounted to $55,422.76. Certain depositors agreed to write off from their claims against the bank the sum of $30,422.76, leaving the impairment of the capital equal to the capital stock, and the superintendent of Banks having issued executions against the stockholders for 100% of their stock, then agreed to withdraw this assessment, and turn over the bank to its stockholders, provided they would levy an assessment sufficient in amount to cover the impairment of the capital, which was equal to

100% of the stock. On Oct. 23, 1926, a stockholders meeting was held at which 136 shares of a total of 250 shares of stock were represented, when the assessment was levied under the resolution set out in full in paragraph 5 of plaintiff's petition, which is made by this reference a part of this statement of facts. The State Superintendent of Banks then cancelled his assessments by the following letter written to each of the stockholders:—

With the co-operation of its depositors, the Citizens Bank of Waynesboro, Georgia, has completed its plans to reopen and resume business.

Before these plans were worked out an assessment of 100% on the stockholders was levied by the Superintendent of Banks for the purpose of paying depositors. It having been determined to reopen the bank, this assessment is hereby recalled and vacated.

Checks covering the amounts paid by the stockholders on account of this assessment have been mailed to the liquidating agent of the bank at Waynesboro, and will be delivered to the stockholders upon request.

The executions which have been issued against the stockholders who have not paid their assessments are being cancelled of record.

This letter was dated Oct. 22, 1926.

[fol. 23] Toombs, the defendant did not attend the stockholders meeting at which the stockholders assessment was levied, has not paid any sum on that account, and has not attended any sort of meeting of stockholders, directors or officers of the bank since that time, and is not a director or officer. Toombs is the owner of property in Wilkes county, Ga. and admits the jurisdiction of this court for the purpose of determining his liability for assessment in this case.

This bank was never in process of liquidation. Under a working agreement between the officials of the Bank and the State Superintendent of Banks it was merely placed in the hands of the department of banking for preservation until some definite plan could be worked out, and in order to accomplish the same, the assessment was levied 100% on each stockholder.

After the Superintendent of Banks of Georgia and the directors and officers of Citizens Bank of Waynesboro had

had time to work out a plan for this bank, the Superintendent of Banks notified the officers and directors of Citizens Bank of Waynesboro under section 1 Article 2 of the Banking Act of Georgia that the capital stock of the bank had become impaired, and required to make good its impairment within sixty days by an assessment upon stockholders, and immediately upon such notice being received from Superintendent of Banks a special meeting of the stockholders was called by officers of the bank. The following is a true copy of the minutes of the meeting of directors of Citizens Bank of Waynesboro held on Oct. 8, 1926, to wit:

Directors of Citizens Bank of Waynesboro met in call meeting Friday evening October 8th 1926, those present being R. C. Neely, Jr., A. W. Neely, J. L. Boyd, J. A. Blount, and H. W. Blount.

The purpose of the meeting was stated by H. W. Blount [fol. 24] to be as follows: The Superintendent of Banks having given notice that the capital of the Citizens Bank of Waynesboro has become impaired and having directed that a call meeting of the stockholders be had for the purpose of making an assessment to cover said impairment.

It was moved by H. W. Blount, seconded by A. W. Neely and carried "That a call meeting of the stockholders of the Citizens Bank of Waynesboro be had on October 23rd 1926, to consider an assessment to cover the impairment of the capital stock of said bank."

It was moved by J. L. Boyd seconded by J. A. Blount and carried that the cashier of said bank H. W. Blount give immediate notice of the call of the stockholders meeting to the various stockholders.

There being no further business the meeting adjourned.

The following notice of stockholders meeting was properly addressed to Gabriel Toombs, Washington, Georgia, the last address of said Toombs with said Bank, stamped and placed in the post office at Waynesboro, Georgia, by W. H. Blount cashier of Citizens Bank of Waynesboro and the envelope in which this notice was enclosed had on the face thereof the following language to wit: After five days return to Citizens Bank of Waynesboro, Lock Drawer A,

Waynesboro, Burke County, Georgia." This letter was never returned to Citizens Bank of Waynesboro. The envelope in which notice was enclosed was addressed as follows: "Mr. Gabriel Toombs, Washington, Georgia, and as above stated properly stamped and placed in post office at Waynesboro, Georgia by H. W. Blount, Cashier of said Bank.

Following is a copy of notice mailed to said Toombs:

October 8, 1926.

Mr. Gabriel Toombs, Washington, Georgia.

Dear Sir: You are hereby notified that pursuant to a directors meeting held this date, there will be a stockholders [fol. 25] meeting of the Citizens Bank of Waynesboro, held in the offices of said bank on the 23rd day of October, 1926.

The purpose of the meeting is to make a stock assessment to cover an impairment in the capital stock of said bank.

You will please appear in person or by proxy.

Yours very truly, H. W. Blount, Cashier.

On October 23, 1926, the meeting of stockholders of said bank was held as set forth in paragraph 5 of plaintiff's petition.

Which said agreed statement of the facts, including paragraph numbered "5" of plaintiff's petition as a part thereof by reference thereto, having been considered by the court, on said 9th day of October, 1928, a judgment was rendered by the court in favor of plaintiff Citizens Bank of Waynesboro and against defendant Gabriel Toombs, to which said judgment of the court defendant excepted, excepts and now assigns the same as error and for grounds of such error says:

Assignments of Error

1. That said judgment is contrary to law.

2. That said judgment is contrary to the evidence and entirely without evidence to support it, thereby being contrary to law.

3. That said judgment is contrary to law, because it appearing from the undisputed facts in the record that the

State Superintendent of Banks had taken charge of said plaintiff bank as an insolvent bank, and had levied an assessment of 100% on said stockholders, as an insolvent bank, and said bank being in fact insolvent to such extent that an assessment of 100% on said stockholders would not pay the indebtedness of the bank by $30,422.76, the cancelling of said assessment and the levy of an assessment by the stockholders was contrary to law because such assess- [fol. 26] ment does not relieve defendant of further liability upon the taking charge of said bank by the State Superintendent of Banks at some future time.

4. That said judgment is contrary to law because it appears from the undisputed evidence that the capital stock of said bank being $25,000.00 and the deficiency of assets of said bank being $55,422.76, the assessment made by said stockholders was and is an assessment which is insufficient to restore the solvency of said bank, that the making of such assessment is unwise, and because of its unwisdom is not an exercise of proper discretion on the part of the stockholders participating in said stockholders meeting, but is an arbitrary assessment made by said stockholders against all the stockholders.

5. That said judgment is contrary to law because the said bank having been chartered under the general banking law of 1893, the stockholders liability fixed by the charter of said bank was repealed by the Banking law of 1919, and no other liability by said stockholders was fixed by said Banking law of 1919, and defendant was not and is not liable for said assessment.

6. That said judgment is contrary to law because the statute under which plaintiff undertook to levy said assessment provides for no notice to stockholders, provides no opportunity for stockholders to be heard on the question whether or not said assessment shall be levied, and said statute providing for no notice or opportunity to be heard are unconstitutional and void because in violation of paragraph three (3) of section one (1) of Article one (1) of this state, and of the fourteenth amendment to the Constitution of the United States.

PRECIPE FOR TRANSCRIPT OF RECORD

Defendant specifies as material to a clear understanding of the errors complained of the following parts of the record:

1. Plaintiff's petition.

[fols. 27 & 28] 2. Defendant's answer, and the judgment of the court.

3. Defendant's demurrer and the order overruling it.

And now within the time required by law comes the defendant and presents this his bill of exceptions and prays that the same may be signed and certified that the errors complained of may be reviewed and corrected.

W. A. Slaton, Counsel for Plaintiff in Error.

P. O. Washington, Ga.

[fol. 29] IN SUPREME COURT OF GEORGIA

JUDGMENT—September 24, 1929

The Honorable Supreme Court met pursuant to adjournment.

The following judgment was rendered:

6876

GABRIEL TOOMBS

v.

CITIZENS BANK OF WAYNESBORO

This case came before this court upon a writ of error from the Superior Court of Wilkes county; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur, except Russell, C. J., and Atkinson, J., who dissent.

[fol. 30] IN SUPREME COURT OF GEORGIA

TOOMBS

v.

CITIZENS BANK OF WAYNESBORO

OPINION—September 24, 1929

HINES, J.:

1. The Citizens Bank of Waynesboro was chartered on February 2, 1898, under the act of December 20, 1893, which provided a general method for the incorporation of banks by the Secretary of State. Acts 1893, p. 70; Civil Code (1910), §§ 2262 et seq.; 9th Annual Report of Department of Banking, p. 170. Stockholders in a bank chartered under this act were made liable for all of the debts of the bank to the extent of their unpaid shares of stock, and were further additionally made individually liable equally and ratably, and not one for another as sureties, to depositors of said bank for all moneys deposited therein, in an amount equal to the face value of their respective shares of stock, it being the true intent and purpose of said act that, as to depositors of all moneys deposited in said banks, there should be an individual liability upon the stockholders therein over and beyond the par value of their original shares of stock, equal in amount to the face value thereof. Acts 1893, pp. 70, 72; Civil Code (1910), § 2270.

2. The above liability of stockholders to depositors of this bank was not repealed by section 1 of article 21 of the general banking act of 1919 (Acts 1919, pp. 135, 222), which provides that "This act shall take effect from and after the 1st day of January, 1920, and shall then supersede all existing laws regulating banks and banking in this State." The language, "shall then supersede all existing laws regulating banks and banking in this State," cannot properly be construed as relieving stockholders in a bank from a liability imposed upon them by the general act of 1893, [fol. 31] under which it was chartered.

3. By the act of December 16, 1895, it is provided that "when the bank examiner or assistant bank examiner finds that the capital stock of any bank chartered under the laws

of this State has become impaired or reduced from losses or any other source, the bank examiner shall require such bank to make good its capital stock so impaired or reduced, by a transfer from its surplus or undivided profits * * * to the capital stock [of] a sum sufficient to make good such impairments or reductions; and if there is no surplus or undivided profits, or not enough to make good said capital stock, then by an assessment upon the stockholders thereof." Acts 1895, p. 58; Civil Code (1895), § 1926. This act having been passed prior to the grant of the charter of the Citizens Bank of Waynesboro, its terms must be read into the charter thereof; and its stockholders were thereby made liable for assessments to make good the impairment or reduction of its capital stock under the circumstances stated therein. Besides, this liability of stockholders in a bank to make impairment of its capital stock good has been continued in the subsequent acts regulating banks and banking in this State. Acts 1907, p. 85; Civil Code (1910), § 2291; Acts 1919, pp. 135, 152; Acts 1925, pp. 119, 125.

4. Sections 1, 2, and 3 of article 6 of the act of August 16, 1919, creating the department of banking (Acts 1919, pp. 135, 152), as amended by the act of August 26, 1925 (Acts 1925, pp. 119, 126), are not unconstitutional and void because they violate the due-process clauses of the State and Federal Constitutions, in cases when assessments are made against stockholders under section 1 of said article, and suit is brought under section 2 thereof to recover such assessments, as the stockholder can set up any legal defense which he may have to the suit for the collection of [fol. 32] said assessment. Whether so much of section 2 of said article which gives to the directors of such bank the right to sell to the highest bidder, at public outcry for cash, a sufficient amount of the stock of such stockholder to recover the assessment, after giving previous notice of such sale, as therein provided, where the stockholder refuses or neglects to pay the assessment, is unconstitutional because it violates the due-process clauses of the State and Federal constitutions, is not now for decision.

5. By section 6 of article 7 of the act of August 16, 1919 (Acts 1919, pp. 135, 156), it is provided that after the superintendent of banks has taken possession of any bank,

he may permit such bank to resume business upon such conditions as may be approved by him. The Citizens Bank of Waynesboro became insolvent and was taken charge of by the superintendent of banks, who levied an assessment of 100 per cent. on the stockholders. The capital stock of the bank was $25,000. The impairment of its capital amounted to $55,422.76. Certain depositors agreed to write off from their claims against the bank the sum of $30,422.76, leaving the impairment of the capital equal to the capital stock. The superintendent of banks, having issued execution against the stockholders for 100 per cent. of their stock, agreed to withdraw this assessment and turn the bank over to its stockholders, provided they would levy an assessment sufficient in amount to cover the impairment in the capital, which was equal to 100 per cent. of the stock. On October 23, 1926, a stockholders' meeting was held, at which 136 of the 250 shares of the stock of the bank were represented, and an assessment of 100 per cent. of the capital stock was levied, as set out in the petition in this case. The superintendent of banks then canceled his assessments and the executions issued therefor. We hold that the stockholders' assessment to restore the impaired capital of the bank was [fols. 33-40] not improvident under these facts, as such assessment restored the capital of the bank.

6. The writing off by certain depositors of $30,422.76, due by the bank to them on deposits, to enable this bank to continue business, was not illegal for any reason appearing from the record.

7. Other assignments of error are not argued or insisted upon in the brief of counsel for the plaintiff in error, and for this reason they will be treated as abandoned. Mack v. Felt, 166 Ga. 705. The question whether stockholders in a bank who have been once assessed to restore its impaired capital stock can again be assessed for such purpose is not now for decision. Applying the principles above ruled, the court did not err in overruling the demurrer to the petition and in rendering judgment for the plaintiff, under the pleadings and an agreed statement of facts.

8. The former judgment of this court in this case, reversing the judgment of the court below, having been with-

drawn for further consideration, the same is hereby set aside. In rendering such former decision this court overlooked the act of 1895, which subjected the stockholders of this bank, which was chartered after the passage of said act, to an assessment to restore its impaired capital stock.

Judgment affirmed. All the Justices concur, except Russell, C. J., and Atkinson, J., dissenting.

[fol. 41] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED.—Filed Nov. 23, 1929

The appellant by Clement E. Sutton and W. A. Slaton his attorneys presents the following statement of errors upon which appellant intends to rely in the above case and of the parts of the record which appellant thinks necessary for the consideration thereof:

1. That Sections 1, 2, and 3, of Article VI, of the Act of August 16, 1919, creating the department of banking of the State of Georgia, as amended by the Act of August 26, 1925, of the State of Georgia, are unconstitutional and void because they violate the due process clause of the constitution of the United States, to wit the fourteenth amendment to the constitution of the United States because said sections do not provide for notice to be given to each stockholder of the bank of the special meeting of stockholders at which assessments provided for in said sections of said statutes are required to be made.

2. That the assessment actually made by the stockholders under the circumstances of the assessment, was improvident and void, because it did not restore the capital of said bank.

Appellant also states that he considers the following parts of the record necessary for the consideration of the errors on which he intends to rely, to wit:

Page- 4-5. The entire assignment of errors.

Page- 8-10. The petition in the lower court. Print the entire petition, but omitting the process, filing and acknowledgment of service.

Page- 11-14. The answer in the lower Court. Print entire answer.

Page- 15-19. The demurrer in the lower court. Print entire demurrer.

Page- 21-29. The bill of exceptions. Print the entire bill of exceptions, omitting the certificates of the judge and clerk and entries of filing.

Page 30. The opinion of the Supreme Court of Georgia, [fol. 42] omitting from the opinion the statement of facts at the end thereof as a mere restatement of the facts contained in the bill of exceptions.

The judgments of the lower court and of the Supreme Court of Georgia being merely formal, in favor of appellee below, need not be printed.

Respectfully submitted.

Clement E. Sutton, W. A. Slaton, Attorney for Appellant.

Due and legal service of the above and foregoing statement of errors on which appellant intends to rely, and designation of the parts of the record to be printed, acknowledged Nov. 21, 1929.

Ed Morrow, Attorney for Appellee.

[fol. 43] [File endorsement omitted.]

Endorsed on cover: File No. 34,616. Georgia Supreme Court. Term No. 485. Gabriel Toombs, appellant, vs. Citizens Bank of Waynesboro. Filed November 18, 1929. File No. 34,616.

IN THE SUPREME COURT OF THE UNITED STATES

Gabriel Toombs, Appellant, vs. Citizens Bank of Waynesboro, Appellee.	No. 485, Oct. Term, 1923. Appeal from Supreme Court of Georgia.

STATEMENT AS TO THE JURISDICTION

Appellant, Gabriel Toombs, prior to 1919, acquired stock in Citizens Bank of Waynesboro, appellee, which was a state bank incorporated under the laws of Georgia in 1890. At the time of the incorporation of appellee, and at the time appellant acquired his stock therein, the statutes of Georgia provided that if a bank examiner finds that the capital stock of the bank has become impaired or reduced, he should require the bank to make good the impairment or reduction by transfer from surplus or undivided profits, or if there is no surplus or undivided profits, "Then by an assessment upon the stockholders thereof." No provision of law was made for levying such assessments, they were purely voluntary, and the penalty for failure to restore the impairment of capital was for the bank examiner to report the facts to the Governor, who was empowered to cause proceedings to be taken to forfeit the charter of the bank. (See Ga. Laws, 1895, p. 58.) After Appellant had acquired his stock, by the act of August 16, 1919, all existing laws being repealed, the General Assembly passed an act on this subject which provided that when the Superintendent of Banks should determine that the capital stock of a bank had been impaired as much as ten percent, he should require a transfer from surplus or undivided profits to restore the impairment; if the surplus and undivided profits were insufficient to restore the capital, the Superintendent of Banks was required to notify the bank to make good the impairment within sixty days "By an assessment upon the stockholders thereof, and it shall be the duty of the officers and directors of the bank receiving such notice to immediately call a special meeting of the stockholders for the purpose of making an assessment upon its stockholders sufficient to cover the impairment of the capital, payable in cash, at which meeting such assessment shall be made. By this act the bank was

authorized to sell so much of the stock at not less than par as would pay the assessment, or the bank might sue the stockholder for such assessment. (Ga. Laws 1919, p. 135-152, Art. VI, Secs. 1, 2, 3).

By the act of August 26, 1925, these sections of the act of 1919 were amended by adding to section 1 of art. VI. the language:—"At any such special meeting of the stockholders a majority of the stock outstanding at the time shall be deemed a quorum, and such assessment may be made upon a majority vote of the quorum present". Section 2 of Art. VI. was amended by adding to the end of the section the words: "The bank shall, in addition to the right herein given to sell said stock also have the right to sue the stockholder for the full amount of said assessment in the event that said stockholder shall fail to pay the assessment so levied, in lieu of the sale of such stock and at the option of the bank." The statute as amended does not require any form of notice to any stockholder of the special meeting required to be held to levy the assessment.

In 1926, the capital stock of appellee bank, which was $25,000.00, divided into 250 shares of $100.00 each, became impaired to the exetent of $55,522.76, the bank was taken charge of by the Superintendent of Banks, certain depositors wrote from their claims $30,422.76, and the Superintendent of Banks directed the officers to call a special meeting of stockholders to levy a stockholders assessment. A special meeting was held, at which 136 shares of the total 250 were present in person or by proxy. These shares voted for the assessment. Toombs was at that time a resident of Tampa, Fla. A letter was addressed to him at Washington, Ga. He does not appear to have received it. It does not appear that any by-law of the bank required notice to stockholders of their meetings. Suit was filed in Wilkes Superior Court on this assessment against Toombs. He demurred and answered, raising the issue that this statute having been passed after he acquired his stock, and the statute providing that a bare majority of the stockholders being present constituted a quorum, and a bare mapority of those present might levy an assessment, and after so levying the assessment, the bank might sue the stockholder on the assessment so made, and recover a judgment binding all his property, was a denial

of due process of law to him, contravening the constitution of the United States, because the statute did not require notice to each of the stockholders of the special meeting of the stockholders. (R. 15, 11.) The Superior Court having found against him, appellant took the case to the Supreme Court of Georgia, which court in section 4 of its opinion (R. 30-31-32) on Sept 24, 1929 (R 29,) determined that the statute was not unconstitutional and void because it violates the due process clauses of the State and Federal constitutions. Appeal was allowed tothe Supreme Court of the United States Oct. 15, 1929. (R 1.)

Jurisdiction is claimed in the Supreme Court of the United States under sec. 344 (a) of Title 28, United States Code, in this case because the appeal is from a judgment of the highest court of the State of Georgia in which a decision in the suit could be had, where is drawn in question the validity of a statute of the state of Georgia on the ground of its being repugnant to the constitution of the United States and the decision was in favor of its validity.

Counsel have been able to find, and believe that, no case has arisen in which a statute providing for special stockholders meetings in corporations has been attacked as void for want of due process of law, because there was no requirement in the statute for notice to all the stockholders of the special meeting provided for in the statute. This case does not involve the right of the state to amend the charter of the bank. The exact issue is, must the statute providing for these assessments provide for notice to the stockholder of the meetings at which the assessment is levied. No such notice is provided inthis statute. Suit is required to be brought in a court, but the suit required was a suit on the asessment itself, such suit does not grant to the stockholder due process of law, because if the stockholders meeting was held as reqiured by the statute, it was a binding obligation, made so by the statute, the judicial act of determining whether the assessment should be levied was performed by the stockholders, and notice, efficient to provide an opportunity to him to be heard by all the stockholders, was the notice that was necessary to constitute due processof law. The court in which suit was required to be brought was the mere ministerial agent for the enforcement of the previously completed

judicial act of the stockholders in levying the assessment. Under the statute the special meeting of the stockholders was a tribunal created by the State for the purpose of creating a binding liability on each stockholder actually to pay such assessment as a majority of those present might levy. The legislation is vicious because it permits a bare majority of the stockholders to hold a meeting of which the minority have no notice and at such meeting levy an assessment binding all the stockholders, by the vote of a mere majority of those present, which might be a very small minority of the entire body of stockholders.

Appellant prays that if the appeal be determined to be improvidently sought under the section of the Code cited, that the papers on which the appeal was allowed may be regarded and acted on as a petition for certiorari under Section 344 (c) of Title 28, United States Code.

Respectfully submitted.

W. A. SLATON,
Solicitor for Appellant.

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Supreme Court, U.S.
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BRIEF FOR APPELLANT

Supreme Court of the United States

OCTOBER TERM, 1929

No. 485

GABRIEL TOOMBS, APPELLANT

vs.

CITIZENS BANK OF WAYNESBORO

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

(34,616)

(34,616)

Supreme Court of the United States

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GABRIEL TOOMBS, APPELLANT,

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APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

BRIEF FOR APPELLANT.

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JURISDICTION.

Rule 12, Par. 1, has been complied with, and this court has assumed jurisdiction of this case to the extent of its order.

STATEMENT OF THE CASE

(Citations are to the printed record.)

Citizens Bank of Waynesboro was chartered February 2, 1898, under the general law for incorporation of banks in Georgia. Toombs acquired and owned six shares of stock in the bank prior to January 1, 1920 (R-13, 19). When the bank was chartered, and when Toombs acquired his stock the act of December 16, 1895 (Printed in the appendix) was of force. That act provided that when the capital stock of a bank was found by the bank examiner to be impaired he might call on the bank to make good the impairment within 90 days, and if not restored by a voluntary assessment, the Governor might direct a proceeding to wind up the bank. In 1919 the General Assembly passed a general banking law which went into effect January 1, 1920 (Ga. Laws 1919, 135 et seq.) Sections 1, 2 and 3 of Article 6 of tha t act were amended by the Act of August 26, 1925 (Ga. Laws 1925, 119-126) so that after the passage of that act the law provided that when the capital stock of any bank was found by the Superintendent of Banks to be impaired as much as ten per cent he should notify the bank to make good the impairment within 60 days, by an assessment on the stockholders, and the officers receiving the notice were required to call a special meeting of the stockholders to levy the assessment. A majority of the oustanding stock constituted a quorum to hold the meeting, but a majority only of the stock present at the meeting was required to levy the assessment. When the assessment was so made, the bank was permitted to sell enough of the stock of any stockholder who did not pay the assessment t opay it, or to sue him and recover a judgment for the full amount of the assessment, at its option. This act did not require any form of notice to the stockholders of the meeting at which the assessment was required to be levied (See appendix for the act).

August 16, 1926, the bank became insolvent. The Superintendent of Banks took charge, and himself levied an assessment on the stockholders in the full amount of their

statutory liability. (R-13). Oct. 22, 1926, this assessment was cancelled (R-14), Oct. 23, 1926, a stockholders meeting was held at which 136 shares of stock of a total of 250 shares was represented (R-14). The proceedings prior to and at this stockholders meeting appear on pages 15 and 5 of the record, and were: Oct. 8, 1926, a directors meeting was held, attended by five directors, at which a motion was passed calling the stockholders meeting to be held Oct. 23, 1926 (R-15). Oct. 23, 1926, four of these directors and J. H. Whitehead held the stockholders meeting and levied the assessment sued for in this case (R-5). At the time of these proceedings Toombs resided in Tampa, Fla. (R-13). Oct. 8, 1926, a letter was mailed notifying Toombs of the proposed meeting, addressed not to his residence at Tampa, but to Washington, Ga. (R-15, 16). Except for the statement that this letter was stamped and addressed to Washington, Ga. and deposited in the post office, there is no evidence of any effort to notify Toombs. (Note par. 5 of the petition (R-5) is part of the agreed statement of facts (R-13, 16). Toombs did not attend the meeting, and has had no official connection with the bank since its insolvency. (R-14).

The capital of the bank was $25,000.00. Its debts exceeded its assets, $55,422.76. Certain depositors reduced their claims $30,422.76, to make the re-opening of the bank possible. (R-13). Suit was filed to Wilkes Superior Court, the allegations making a case based exclusively on the liability of Toombs to pay this particular assessment (R-4, 5). Toombs by his answer admits the making of the assessment, but denies his liability; he demurs and answers that the proceedings levying this assessment against him are void because the statute providing for the assessment provides for no notice to the stockholders of the intended meeting, and is therefore void because contrary to the due process of law provisions of the fourteenth amendment to the constitution of the United States. (R-8, 10). The demurrer was overruled (R-12) and on an agreed statement of facts (R-13, 16) judgment was rendered in favor of the bank. Exception was taken to the Supreme Court of Georgia, which decided the statute was void as applied to Toombs, withdrew that decision, and rendered the decision here appealed from, two justices of that court dissenting. (R-19, 22).

ASSIGNMENT OF ERRORS

1. The court erred in not holding that sections 1, 2, and 3 of Article 6 of the Act of August 16, 1919, creating the department of Banking (Acts 1919, pp. 152) as amended by the act of August 26, 1925, (Acts 1925, pp. 119-126) were unconstitutional and void because they violate the due process clauses of the State and Federal constitutions to wit, the fourteenth amendment to the constitution of the United States, because said sections do not provide for notice to be given to each stockholder of the special meeting of stockholders at which assessments provided for in said sections of said statutes are required to be made.

2. The court erred in holding that sections 1, 2 and 3 of Article VI, of the Act of August 16, 1919, creating the department of banking (Acts 1919, pp. 135, 152) as amended by the act of August 26, 1925 (Acts 1925, pp. 119, 126) were constitutional and valid, and did not contravene the provisions of the fourteenth amendment to the constitution of the United States, by denying to appellant Gabriel Toombs, due process of law, because at the time said Gabriel Toombs acquired his stock in Citizens Bank of Waynesboro, the only provision of the laws of Georgia which authorized an assessment by stockholders upon themselves being the provisions of the act of December 16, 1895, which provided that upon a determination by the State bank examiner that the capital stock of a bank was impaired, the bank should be required to levy an assessment to restore its capital, and the only penalty provided by said statute being that on the failure to levy such assessment, the Governor should proceed to forfeit the charter of the bank, and by the act of August 16, 1919 (Acts 1919, pp. 132, 152) as amended by the act of August 26, 1925 (Acts 1925, pp. 119, 126) the General Assembly of Georgia having provided that upon a determination by the Superintendent of Banks that the capital of a bank had been impaired as much as ten per cent, the officers of said bank should call a meeting of the stockholders of the bank, at which special meeting a quorum should consist of a majority only of the stock outstanding, and under such statute a majority of the quorum present, at such meeting, which majority of such quorum might be a minority of the total stock outstanding, was authorized

by their vote to levy an assessment on all the stockholders, and after the levy of such assessment, said bank being authorized at its option to sue the stockholder for the full amount of said assessment, recover a judgment therefor and subject all of the property of the stockholder against whom the assessment had been levied to the payment of the same was a denial of due process of law to the apellant Gabriel Toomba, because the special meeting of stockholders so provided for was in effect a judicial tribunal erected by the State for the purpose of exercising the judicial and discretionary act of determining whether such assessment should be levied and the bank continued in operation or should not be levied and the bank liquidated as an insolvent bank, and said statutes having made no provision whatever for notice to all the stockhoders of said bank so that each stockhoder as a result of such notice might attend such meeting and be heard on the question whether or not such assessment was provident or improvident, and said statutes providing that a minority of the stockholders might be authorized to levy such assessment without notice to all the stockholders was and is in violation of the provisions of the fourteenth amendment to the constitution of the United States by denying to the stockholders not required to be notified the due process of law which would arise from notice of such meeting.

3. The court erred in holding that the capital of said bank having been impaired $55,422.76, and in order to make an assessment sufficient to restore the capital of said bank creditors and depositors were required to write off of their claims the sum of $30,422.76, so that a levy of an assessment of 100 per cent would restore the capital of the bank, the levy of such assessment under the facts of this case was a valid and binding and provident exercise of the power granted to a minority of the stockholders without requiring notice to all the stockholders.

ARGUMENT.

This record raises no question of the right of a state to amend its banking laws so that the change would affect the rights of stockholders in banks existing at the time of the enactment of the new laws. The exact question here is, whether having amended the existing laws so that pro-

vision is made for the levy of assessments by the stockholders themselves at a special stockholders meeting to restore the impaired capital of the bank, due process of law was denied to this particular stockholder because the statute providing for such assessments did not require notice of the stockholders meeting to all the stockholders. The statute, after providing that when the capital stock of a bank becomes impaired the Superintendent of Banks may direct the officers to call a special meeting of stockholders to assess each shareholder an amount sufficient to restore the capital, makes the following provisions matreial to this case:

"At any such special meeting of the stockholders, a majority of the stock outstanding at the time shall be deemed a quorum, and such assessment may be made upon a majority vote of the quorum present.

"The bank shall, in addition to the right herein given to sell said stock also have the right to sue the stockholder for the full amount of said assessment in the event that said stockholder shall fail to pay the assessment ~~in the event that said stockholder shall fail to pay the assessment~~ so levied, in lieu of the sale of such stock and at the option of the bank" (Ga. Laws 1925, p. 126, set out in appendix.)

In Smith vs. Mobley, 166 Ga. 195, the Supreme Court of Georgia determined that this stockholders assessment was a purely voluntary act on the part of the stockholders and that it was their righ to elect whether they would assess themselves to restore the impaired capital or would permit the liquidation of the bank by the Superintendent of Banks as an insolvent bank.

The provision of the statute above quoted is not a substitute for the stockholders liability to creditors of the bank, amounting to a sum equal to the par value of the stock, which is covered by sec. 1 of Art. XVIII of the Banking Act 1919, (Ga. Laws 1919, p. 189 set out in the appendix). Its purpose is to continue the business of the bank as a going concern. The statutory liability applies only to an insolvent bank in process of liquidation.

Delano vs. Butler, 118 U. S. 634.

Since the statute here under consideration, the text of the material parts of which is set out in the appendix, makes no provision whatever for notice to a stockholder

of this meeting, the single question here for decision is, does such a statute, permitting a minority of the stockholders to procure the attendance of a bare majority of the outstanding stock at a meeting, and at such meeting authorizing such minority to vote an enforcable liability against all the stock, denies to those stockholders who are absent due process of law.

We do not contend that due process of law as defined by this and other courts means any particular form of proceedure. It does mean such notice of the intention to fix a liability, and such opportunity to attend and be heard, before liability is fixed, as is usual, proper, and protective of the essential rights of the citizen in the possessio nof his property. The form of process, the kind of notice, and the extent and nature of the opportunity to be heard, are determined by the particular forum in which the citizens rights are to be affected. In this case we contend that due process of law required notice of the intention to hold this stockholders meeting, an opportunity to attend it, the right to exercise his privilege as a stockholdholder to discuss the assessment, cast his ballot for or against it, as he saw fit, and to have every stockholder notified of the meeting that all of them might attend, all might take part in the discussion, and all might after discussion express their preference on the question whether or not the bank should continue to operate or should be liquidated.

Until this act was passed, the decisions of the courts of Georgia were uniform that an increase of the liability of the stockholder was a material alteration of his contract, an increase of the capital stock was a material change of his liability, and was void unless concurred in by an unanimous vote of the stockholders. Neither the corporation itself, nor the state, although the right to amend charters was reserved by it, could affect the righs of stockholders wihout their unanimous consent.

Winter vs. Muscogee R. R. Co., 11 Ga. 438.

Snook vs. Ga. Imp. Co., 83 Ga. 61, 65.

Alexander vs. A. & W. P. R. R., 108 Ga. 157.

The Constitution of Georgia contains this provsiion:

"No grant of special privileges or immunities shall be revoked, except in such manner as to work no injustice to the corporators or creditors of the corporation."

Civil Code, 1910, No. 6390.

On the insolvency of a bank under the Georgia law, each stockholder was liable to pay to its creditors the par value of his stock in addition to his original subscription. (Ga. Laws 1919, p. 186, see appendix) Under that condition his liability was fixed:

"The obligation of this conrtact binds a stockholder to pay t othe creditors of the corporation an amount sufficient to pay the debts of the corporation which its assets will not pay up to an amount equal to the stock held by each stockholder. That is his conrtact and the duty which the statute imposes, and that is his obligation. Any statute which took away the benefit of such contract or obligation would be void as to the creditor, and any attempt to increase the obligation beyond that incurred by the stockholder would fall within the prohibition of the constitution."

Bernheimer vs. Converse, 207 U. S. 516, 530.

Most of the cases involving the issue of due process of law, fall within one of two classes. Either in a judicial proceeding there is a want of the formality required to give the party an opportunity to present his claim or defense to the tribunal clothed with the authority to grant or deny him relief, or in the process of assessing taxes, the taxpayer is denied an opportunity to be heard before his taxes are fixed. Neither of these situations is exactly parallel to the due process of law necessary to protect the rights of a stockholder in a corporation which is clothed with the authority to increase the liability of each stockholder by the act of all or a part of the stockholders. When the differences in the form of proceedure in the various tribunals are considered and allowed for, however, the essential requirement of notice, and an opportunity to he heard before the liability becomes fixed and determined, remain as the foundation stones of due process. Whatever provides this notice and its corresponding opportunity to be heard before a properly constituted tribunal, is due process. Whatever denies these essentials is lack of due process. We therefor quote the following case, not as being directly in point, but as illustrating what is essential in any forum to make due process of law.

"Due process of law as applied to judicial proceedings instituted for the taking of private property for public use

means therefore such process as recognizes the right of the owner to be compensated if his property be wrseted from him and transferred to the public. The mere form of the proceeding instituted against the owner even if he be admitted to defend can not convert the process used into due process of law, if the necessary result be to deprive him of his proprty without compensation."

C. B. & Q. R. R. vs. Chicago, 166 U. S. 226, 236.

"The validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently."

Pennoyer vs. Neff, 95 U. S. 714, 728.

"Due process of law requires that at some stage of the proceeding, before the tax becomes irrevocably fixed, the taxpayer must have an opportunity to be heard, of which he must have notice, whether personal, by publication, or by some statute fixing the time and place of the hearing."

Turner vs. Wade, 254 U. S. 64, 68.

"But where the legislature of a state, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard of which he must have notice, either personal, by publication, or by a law fixing the time and place of the hearing."

Londoner vs. Denver, 210 U. S. 373, 385.

"There is no course of reasoning as to the character of an assessment upon lots for a local improvement by which it can be shown that any juridiction to collect the assessment personally from a non resident can exist. The state may provide for the sale of the property upon which the assessment is laid, but it can not under any guise or pretense proceed further and impose a personal liability upon a non-resident to pay the assessment, or any part of it. To enforce an assessment of such a nature against a non-resident, so far as his personal liability is concerned would amount to the taking of property without due process of law, and would be a violation of the Federal Constitution.

"The principle which renders void a statute providing for the personal liability of a non-resident to pay a tax of this nature is the same which prevents a state from taking jurisdiction through its courts, by virtue of any statute, over a non-resident not served with process within the state, to enforce a mere personal liability, and where no property of the non resident has been seized or brought under the control of the court."

Dewey vs. DesMoines, 173 U. S. 192, 203, 3.

"It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them a right to a hearing and an opportunity to be heard."

Coe vs. Armour Fertilizer Works, 237 U. S., 413, 424.

Security Trust Co. vs. Lexington, 203 U. S. 323, 333.

Central of Ga. Ry. vs. Wright, 207 U. S. 127, 138.

L. & N. R. R. vs. Stock Yards Co., 212 U. S. 132, 141

The Banking Laws of the State of Georgia, contained in Ga. Laws, 1919, on pages 135, 222, provide for seven special stockholders meetings. In Art. 7, Sec. 25, on page 162, a meeting to elect an agent for a liquidated bank, in Art. IX, sec. 2, on page 169, a meeting to authorize the amendment of a charter, in Art. X, sec. 1, on page 172, a meeting fo rthe renewal of a charter, in Art. XII, sec. 1, on page 176, a meeting for conversion of a national bank to a state bank, in Art. XIII, sec. 2, on page 179, a meeting for the consolidation of banks, in Art. XIV., sec. 1, on page 181, a meeting for the voluntary liqudiation of a bank, there is special provision made for stockholders meetings, the details of the holding of each of which, and notice of which is particullarly provided for. Nowhere in the act, is there any general provision for the holding of special meetings of stockholders. In Art. VI, secs. 1, 2 and 3, which provides for a special stockholders meeting to levy an assessment by the stockholders themselves, not only is a minority of the stockholders given the power to levy the assessment, but no provision whatever is made for notice to any stockholder by the law. The lack of this provision for notice is what we complain of.

In the statute we are discussing, a special stockholders meeting is provided for, at whic ha majority of the outstanding stock being represented, a majority of that quo-

rum may fix the liability of all the stockholders to pay any assessment voted by these stockholders represented at the meeting. In this case there were 250 shares, 126 shares constitute a quorum, if a quorum is present of only 126 shares, 63 shares then may levy the assessment. This assessment is binding from the day of the vote on every stockholder whether present or absent. It is true that the bank must sue in a court to enforce the assessment, but the only issue presented in such a suit is the question whether or not the assessment was levied in the manner provided by the statute. In this case Toombs demurred on the ground that no cause of action was set forth in plaintiff's petition (R-9) and that ground was overruled by the court. That question was not argued in the Supreme Court of Georgia because the ruling was sound. The statute had been complied with as written. So that the simple allegation that the superintendent of banks had determined that the capital stock had been impaired, that a stockholders meeting had been called, that a majority of the stock was represented at that meeting, and that a majoriy of the stock represented at the meeting had voted to levy the assessment, demanded a judgment in favor of the bank under the terms of this law.

From these facts it appears that the stockholders meeting provided for by this statute was a special tribunal erected by the state of Georgia for the purpose of fixing the liability of all the stockholders to pay the assessment levied. When the assessment was so levied, the court in which suit was brought was a mere machine for the enforcement of the liability already created. If the statute had been followed, the court was without discretion. The judicial act of determining whether it was provident or improvident to continue this bank in operation as a going concern, or to permit its liquidation as an insolvent bank was performed by the stockholders meeting. The court in which suit was brought was bound by the action of the stockholders, and could not go behind it.

For these reasons we contend that due process of law required that this stockholder should have notice of the meeting, and an opportunity to attend it and discuss this question with all the stockholders. He was not only entitled to notice so that he could be present himself, but he was entitled to have every other stockholder notified so

that they could be present. The whole body of the stockholders constituted a tribunal peculiar in its nature in the fact that the body of stockholders, regularly assembled in the meeting, composed court, jury, parties and witnesses. As a body they were the whole court. Toombs' right extended further than such notice as might enable him to be present, it included the right to have every stockholder notified, so that each of them might if he saw fit, be present, take part in any discussion, and join which ever side of the argument appealed to his judgment. Only by making provision for compulsory notice to each of the stockholders, whether they saw fit to attend or not, could this statute provide the notice and opporunity to be heard, which protects the rights of each individual stockhol' r.

What did occur in this case? Five directors of the bank held a meeting at which they called a stockholders meeting. (R-15). Fourt of these directors and J. H. Whitehead, held the stockholders meeting (R-5). Mr. R. C. Neely, Jr. appears to have had control of the meeting after it was called, because he seems to have controlled 120 shares. There is not a sylable of evidence in the record to show that any attempt whatever was made to notify any stockholder not present, except Toombs, and the alleged notice to Toombs was not sent to his actual address, but to Washington, Ga. It does not appear that Washington, Ga. ever was the address of Toombs. It does not appear that it was his last known address. The record is entirely silent on the question of his address except that at the time of these transactions he lived at Tampa, Fla. These directors of the bank who called and who held this stockholders meeting were its officers, W. H. Blount, the cashier, was present at both meetings. Being officers, their interest was to continue the operations of the bank if they could. They were drawing the salaries. Their interest in their salaries was probably much larger than their interest in the small number of shares of stock held by each. The broadest opportunity for fraud was presented, and the tribunal erected to determine judicially the rights of other stockholders was biased both by their personal interest, and by their desire to restore if possible their lost reputation as business men, somewhat tarnished by the failure of the bank they were managing. They were of course interested in having present only such stockholders as would vote as they desired.

The third assignment of error presents no Federal question. If this court sees fit, having assumed jurisdiction on a Federal question, it may decide all the questions in the case. That is a matter exclusively for the court. The record discloses that the assets of the bank were less than its liabilities in the sum of $55,422.76, that the capital of the bank was $25,000.00, and that certain depositors wrote off from their claims $30,422.76, so that this assessment could restore the capital of the bank (R-5). The assessment would have left the bank insolvent, if these depositors had not written down their claims. Toombs did not consent to this. None of the other stockholders appear to have consented to it. The stockholders meeting had no jurisdiction unless the assessment restored the capital of the bank. Their jurisdiction to levy the assessment was based on the fact that the capital of the bank was impaired. In this case the capital was entirely destroyed, and was not restored by the assessment. Can creditors, without the consent of their debtors, confer jurisdiction on any tribunal to fix the liability of their debtors, by entering a credit on their claims. These facts make the entire transaction on outrageous invasion of the rights of every stockholder in every bank in Georgia, because if this assessment is sustained, the most improvident acts of the officers of banks will be without the control of their stockholders or of the law.

Respectfully submitted,

W. A. SLATON,
Solicitor for Appellant.

P. O. Washington, Ga.

APPENDIX.

The material parts of statutes cited

Act of Dec. 16, 1895, Ga. Laws 1895 p. 58.

Section 1 Be it enacted by the General Assembly of Georgia, and it is hereby enacted by authority of the same That from and after the passage of this Act, when the bank examiner or assistant bank examiner finds that the capital stock of any bank chartered under the laws of this state has become impaired or reduced from losses or any other source, the bank examiner shall require such bank to transfer from its surplus or undivided profits thereof to the capital stock a sum sufficient to make good such impairments or reductions, and if there is no surplus or undivided profits, or not enough t omake good said capital stock, then by an assessment upon the stockholders thereof.

Section II Be it further enacted, That should any bank fail or refuse to comply with this Act, the bank examiner shall report such refusal to the Governor, who is hereby authorized and directed to cause proper proceedings to be instituted for the forfeiture of the charter of such bank.

Act of August 6, 1925, Amending the act of 1919.

Acts 1929, p. 126

ARTICLE VI.

Impairment of Capital.

Section 1. Assessment of stockholders.

Whenever the Superintendent of Banks shall find that th ecapital stock of any bank has become impaired or reduced as much as ten per cent of its par value from losses or any other causes, the Superintendent of Banks shall notify and require such bank to make good its capital stock so impaired or reduced wtihin sixty (60) days, by an assessment upon the stockholders thereof, and it shall be the duty of the officers and directors of the bank receiving such notice to immediately call a special meeting of the stockholders for the purpose of making an assessment upon its stockholders sufficient to cover the impairment of the capital, payable in cash, at which meeting such assessment shall be made, provided that such bank may reduce its capital to the extent of the impairment if such reduction will not place its capital below the amount required by his Act. At any such special meeting of the stockholders, a majority of the stock outstanding at the time shall

be deemed a quorum, and such assessment may be made upon a majority vote of the quorum present.

Section 2. Assessment, how enforced. If any stockholder should refuse or neglect to pay any assessment which may be levied by the special stockholders meeting for the purpose of making good any impairment or reduction of capital within thirty days after such assessment shall have been levied, the directors of such bank shall have the right to sell to the highest bidded, at public outcry, for cash, a sufficient amount of the stock of such stockholder to cover the assessment after giving previous notice of such sale, once a week for two (2) weeks, in the newspaper in which sheriff's advertisements of the county in which the bank is located are published. In the event said stock is sold for less than the amount of the assessment upon same and necessary costs of sale, the bank shall have the right to sue such stockholder for the difference between the amount of the assessment and the proceeds of the sale. Out of the proceeds of the sale of said stock, the directors shall pay the necessary costs of sale and the amount of the assessment called for thereon and the balance, if any shall be paid to the person or persons whose stock has ben sold, or to the holder of the certificate therefor upon the surrender of such ~~certificate. A sale of the stock was as hrein provided~~ certificate. A sale of the stock as herein provided shall effect an absolute cancellation of the outstanding and shall make the same null and void, and the rights of any and all stockholders thereof shall terminate and a new certificate or certificates shal be issued to the purchaser or purchasers of such stock free from all liens, or claims whatsoever. The bank shall in addition to the right herein given to sell said stock also have the right to sue the stockholder for the full amount of said assessment in the event that said stockholder shall fail to pay the assessment so levied, in lieu of the sale of such stock and at the option of the bank.

Act of Aug. 26, 1825, amending Act of 1919.

Stockholders liability. Acts. 1925, p. 134.

Section 1. Stockholders liability, extent of. A bank incorporated under this act shall be responsible to its creditors to the extent of its capital and its assets; and

each stockholder shall be individually liabe for all the debts of said bank to the extent of the balance remaining unpaid on his or her shares of stock, and said stockholders shall be further and additionally liable, equally and ratably (and not one for another) to depositors of said bank for all moneys deposited therein, in an amount equal to the face value of their respective shares of stock; it being the true intent and purpose of this section, that as to depositors for all moneys deposited with said bank there shall be an individual liability upon each stockholder of such bank, over and beyond the par value of his or her original shares of stock equal in amount to the face value of said shares of stock; provided that said liability of the stockholders shall not prevent depositors from having equal right with all other creditors upon capital, property and assets of said bank, provided further that the funds realized from the stockholders liability as herein provided for shall not be distributed to those depositors holding a preference or a priority given them by law or otherwise nor to any depositor holding assets of said bank pledged as security for said deposit except to the extent of the amount of the excess of said deposit over the value of such security, and this provision shall apply, irrespective of whether the bank was or was not incorporated under this act.

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APR 21
CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1929

No. 485

GABRIEL TOOMBS, Appellant

vs.

CITIZENS BANK OF WAYNESBORO

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

BRIEF FOR APPELLEE

(34,616)

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STATEMENT OF THE CASE

The Citizens Bank of Waynesboro became insolvent on or about August 16, 1926, and its affairs were surrendered to the Superintendent of Banks for the State of Georgia for liquidation. Subsequent to the failure of the bank certain of its depositors reduced their claims in an amount sufficient to leave the deficit equal to amount of the required capital. The stockholders determined to reopen the bank and at a legal and duly called meeting levied an assessment of 100% of the face value of the stock to make good the impairment of the capital. The appellant was a stockholder and refused to pay the assessment so levied. The bank brought suit against him and the court rendered judgment in favor of the bank. Appellant appeals from judgment of Supreme Court affirming trial court. Reported in 149 S. E. 645.

THE ERRORS ASSIGNED

In the statement of points to be relied upon, appellant insists that §§ 1, 2 and 3 of Article VI of the Georgia Banking Law denies him due process of law because under those sections no provision is made for notice to the stockholders of the special meeting at which the assessment is levied.

THE SECTIONS UNDER ATTACK

§§1, 2 and 3 of Article VI of the Georgia Banking Act of 1919, as amended by the Act of 1925, which appellant insists denies him due process of law, are quoted in full in the margin.*

---

*"Whenever the Superintendent of Banks shall find that the capital stock of any bank has become impaired or reduced as much as ten per cent. of its par value from losses or any other causes, the Superintendent of Banks shall notify and require such bank to make good its capital stock so impaired or reduced within sixty (60) days, by an assessment upon the stockholders thereof, and it shall be the duty of the officers and directors of the bank receiving such notice to immediately call a special meeting of the stockholders for the purpose of making an assessment upon its stockholders sufficient to cover the impairment of the capital, payable in cash, at which meeting such assessment shall be made, provided that such bank may reduce its capital to the extent of

the impairment if such reduction will not place its capital below the amount required by this Act. At any such special meeting of the stockholders a majority of the stock outstanding at the time shall be deemed a quorum, and such assessment may be made upon a majority vote of the quorum present."

§ 2366 (48), *Michie's Code.*

"If any stockholder should refuse or neglect to pay any assessment which may be levied by the special stockholders' meeting for the purpose of making good any impairment or reduction of capital within thirty (30) days after such assessment shall have been levied, the directors of such bank shall have the right to sell to the highest bidder, at public outcry, for cash, a sufficient amount of the stock of such stockholder to cover the assessment after giving previous notice of such sale once a week, for two (2) weeks, in the newspaper in which the sheriff's advertisements of the county in which the bank is located are published. In the event said stock is sold for less than the amount of the assessment upon same and necessary costs of sale, the bank shall have the right to sue such stockholder for the difference between the amount of the assessment and the proceeds of the sale. Out of the proceeds of the sale of said stock, the directors shall pay the necessary costs of sale and the amount of the assessment called for thereon, and the balance, if any, shall be paid to the person or persons whose stock has been sold, or to the holder of the certificate therefor upon the surrender of such certificate. A sale of the stock as herein provided shall effect an absolute cancellation of the outstanding certificate or certificates evidencing the stock so sold, and shall make the same null and void, and the rights of any and all stockholders thereof shall terminate and a new certificate or certificates, shall be issued to the purchaser or purchasers of such stock, free from all liens, or claims, whatsoever. The bank shall, in addition to the right herein given to sell said stock also have the right to sue the stockholder for the full amount of said assessment in the event that said stockholder shall fail to pay the assessment so levied, in lieu of the sale of such stock and at the option of the bank."

§ 2366 (49), *Michie's Code.*

"When any stockholder shall have pledged or hypothecated his stock, and the title thereto by reason of insolvency or other legal process, has been acquired by the pledgee, the bank shall have the right to notify the pledgee to cause said stock to be transferred upon the books of the banks, and upon failure of said stockholder to present said stock to the bank for the purpose of having same transferred, thereon within six months after the receipt of such notice, then the bank shall cause the same to be sold in the same manner as Sheriff's sales are now held. A sale of said stock as herein provided shall effect an absolute cancellation of the outstanding certificate or certificates evidencing the stock so sold, and shall make the same null and void, and the rights of the holder or holders thereof shall terminate and a new certificate or certificates shall be issued to the purchaser of said stock free from all liens or claims whatsoever. The proceeds of said sale shall be first applied to the expenses of the bank in making said sale, and the remainder, if any, shall be paid to the pledgee."

§§ 2366 (50½), *Michie's Code.*

BRIEF OF THE ARGUMENT

I.

THE ORIGINAL SECTION PROVIDING FOR ASSESSMENT TO RESTORE IMPAIRED CAPITAL.

The first general statute in the State of Georgia providing for assessments to restore impaired capital of banks was enacted December 16, 1895. It provided:

> "When the bank examiner or assistant bank examiner finds that the capital stock of any bank chartered under the laws of this state has become impaired or reduced from losses or any other source, the bank examiner shall require such bank to make good its capital stock, so impaired or reduced, by a transfer from its surplus or undivided profits * * * to the capital stock (of) a sum sufficient to make good such impairment or reduction, and if there is no surplus or undivided profits or not enough to make good said capital stock, then by an assessment upon the stockholders thereof."

Acts 1895, *p.* 58, § 1; *Civil Code* 1895, § 1926.

This statute was enacted prior to the grant of the charter of the Citizens Bank of Waynesboro.

The liability of stockholders to restore impaired capital stock was continued in subsequent acts regulating banks and banking in this State.

Acts 1907, *p.* 85; § 2291. *Park's Ann. Code* 1914.

This section is quoted in full in the margin.*

---

*"Whenever it shall appear that the capital stock of any bank or trust company doing business under this law has been impaired over ten per cent., the State bank examiner shall notify such bank to make such impairment good within ninety days, and it shall be the duty of the officers and directors of any bank receiving such notice from the State bank examiner to immediately call a special meeting of its stockholders for the purpose of making assessment on its stock, sufficient to cover the impairment of its capital, payable in cash: Provided, that such bank may reduce its capital to the extent of the impairment, if such reduction will not place its capital below the amount required by this law."

§ 2291, *Park's Ann. Code*, 1914.

II.

STOCKHOLDERS GIVEN ADEQUATE REMEDY TO CONTEST THEIR LIABILITY.

There is nothing in the sections under attack that denies stockholders due process of law. §1 of Article VI of the Banking Act (§2366(48) Michie's Code) provides that the Superintendent of Banks shall determine the extent to which the capital stock of a bank has become impaired. It then becomes necessary for the bank to call a special meeting of its stockholders to determine whether or not the capital stock shall be restored or its assets and affairs surrendered to the Superintendent of Banks for liquidation. Stockholders necessarily are notified of the special meeting. Record discloses appellant was notified of meeting at which assessment sought to be enforced was levied. (R. 15, 16).

Even though under this section the Superintendent of Banks is authorized to determine the amount of assessment necessary to restore impaired capital stock, it does not deprive stockholders of due process of law. The bank's stockholders are its managers for the purpose of determining whether or not it shall continue to operate or liquidate. Necessarily some provision of law must be made for the handling of such situations.

The sections under attack are similar to

R. S. § 5205; *Title* 12, § 55, *U. S. Code.*

Mr. Justice Day, speaking for this Court, said of this section.

> "The assessment ordered by the comptroller was for the purpose of restoring the capital of the bank, and thus enabling it to continue its business. Ample power is conferred upon the comptroller for this purpose."
>
> *Commercial Natl. Bank v. Weinhard*, 192 *U. S.* 243, 247.

The method chosen to enforce the liability of appellant was by suit. He had every opportunity to appear and defend; if any of the proceedings were irregular or if the assessment was improvidently levied he had every opportunity to be heard before the issues were decided.

Appellant by becoming stockholder assumed the liability sought to be enforced.

Coffin Bros. v. Bennett, 277 *U. S.* 29.

III.

FORMS OF PROCEDURE IN STATE COURTS ARE NOT CONTROLLED BY THE 14TH AMENDMENT.

This court has said:

> "The 14th Amendment to the Constitution in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard, before the issues are decided."

Iowa Central R. Co. v. Iowa, 160 *U. S.* 389 (*h. n.*).

Similar language was used in:

Louisville, etc. R. Co. v. Schmidt, 177 *U. S.* 230.

And in:

Brown v. New Jersey, 175 *U. S.*, 172.

The fundamental requirement of "due process" is an opportunity for hearing and defense.

Ballard v. Hunter, 204 *U. S.* 241.

> "The essential elements of due process of law are notice and opportunity to defend, and in determining whether such rights are denied the court is governed by the substance of things, not by mere form."

Simon v. Craft, 182 *U. S.*, 427.

"Due Process" is afforded if at any stage of the proceeding before final judgment an opportunity to defend is given.

Hager v. Reclamation Dist. 111 *U. S.* 701.

> "It is scarcely necessary to say that this court when asked to review proceedings in state courts have always held that due process of law is afforded litigants if they have opportunity to be heard at any time before final judgment is entered."

Wilson v. Standefer, 184 *U. S.* 399, 415.

The court, speaking through Mr. Justice Stone, seems to have stated the whole law in a single paragraph. It was there said:

> "It has been so often pointed out in the opinions of this court that the Fourteenth Amendment is concerned with the substance and not with the forms of procedure as to make unnecessary any extended discussion of the question here presented. The due process clause does not guarantee to a citizen of a state any particular form or method of state procedure. Its requirements are satisfied if he has reasonable notice, and reasonable opportunity to be heard and to present his claim or defense; due regard being had to the nature of the proceedings and the character of the rights which may be affected by it."

Missouri Ex rel. Hurwitz v. North, 271 *U. S.* 40.

See also:

Coffin Bros. v. Bennett, 277 *U. S.* 29.

Appellant in his brief makes some reference to the remedial legislation which provides the machinery for enforcing voluntary assessments. He contends that such legislation impairs the obligations of contracts. There is no assignment of error on this point. We, therefore, deem it unnecessary to enter into any discussion of the subject.

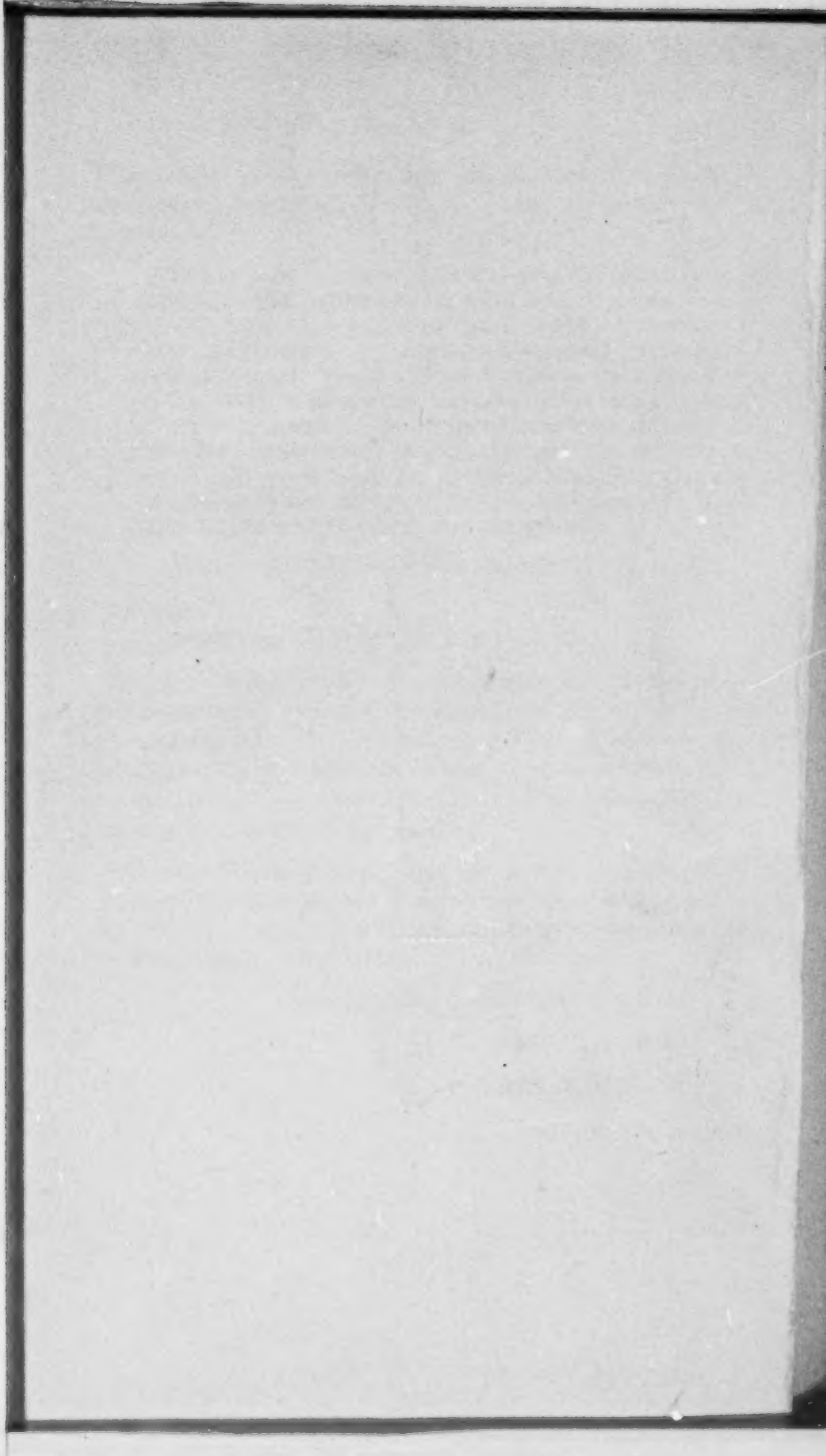
We respectfully submit that the sections of the Banking Law under attack do not deprive the appellant of his property without due process of law contrary to the guarantee of the Fourteenth Amendment.

Respectively submitted,

CARL N. DAVIE,

EARL NORMAN,

Solicitors for Appellee.



SUPREME COURT OF THE UNITED STATES.

No. 485.—October Term, 1929.

Gabriel Toombs, Appellant, vs. Citizens Bank of Waynesboro. } Appeal from the Supreme Court of the State of Georgia.

[May 26, 1930.]

Mr. Justice Stone delivered the opinion of the Court.

This is an appeal from a judgment of the Supreme Court of Georgia, upholding the constitutionality of the provisions of the Georgia statutes regulating the assessment, by corporate action, of shareholders of state banking institutions whose capital has become impaired. — Ga. —. Section 1 of Art. VI, Georgia Banking Law, Act of August 26th, Ga. Laws, 1925, p. 126, amending Art. VI, Ga. Laws, 1919, p. 135; Ga. Civil Code, § 2366, (48), (49).

Section 1 (printed in the margin[1]) provides that when the capital of a state bank is impaired the Superintendent shall require the bank to make good the impairment by assessment upon the stockholders, and that "it shall be the duty of the officers and directors of the bank receiving such notice to immediately call a special meeting of the stockholders for the purpose of making an assessment on

[1]Section 1. Assessment of stockholders.

Whenever the Superintendent of Banks shall find that the capital stock of any bank has become impaired or reduced as much as ten per cent of its par value from losses or any other causes, the Superintendent of Banks shall notify and require such bank to make good its capital stock so impaired or reduced within sixty (60) days, by an assessment upon the stockholders thereof, and it shall be the duty of the officers and directors of the bank receiving such notice to immediately call a special meeting of the stockholders for the purpose of making an assessment upon its stockholders sufficient to cover the impairment of the capital, payable in cash, at which meeting such assessment shall be made, provided that such bank may reduce its capital to the extent of the impairment if such reduction will not place its capital below the amount required by this Act. At any such special meeting of the stockholders a majority of the stock outstanding at the time shall be deemed a quorum, and such assessment may be made upon a majority vote of the quorum present.

its stockholders sufficient to cover the impairment". Section 2 authorizes the bank, in addition to other remedies, to bring suit against stockholders for the amount of the assessment. The Supreme Court of the state, construing the statute, has held that an assessment under the provisions of § 1 (formerly in § 2 of Art. VI of the Georgia Banking Law, Ga. Laws 1919, p. 135) is a voluntary act on the part of the stockholders, who may, at their election, by action taken at the stockholders meeting, levy the assessment, or decline to levy it and permit the liquidation of the bank by the Superintendent of Banks, who may levy an assessment under another provision of the statute not now involved. *Smith* v. *Mobley*, 166 Ga. 195. Arts. VI and VII of the Georgia Banking Law, Ga. Laws, 1919, p. 135.

Petitioner is the owner of shares of capital stock of the Citizens Bank of Waynesboro, chartered under the Georgia statutes January 1st, 1920. On August 16, 1926, the bank became insolvent and passed into the control of the State Superintendent of Banks, who found that the net indebtedness of the bank exceeded its capital. Certain depositors of the bank having undertaken to release their claims so that its indebtedness would equal its capital, the Superintendent of Banks agreed to surrender his control of the bank if its stockholders would authorize a levy of an assessment of 100% of the par value of the stock. A stockholders meeting, held October 22, 1926, at which a majority of the shares was represented, adopted resolutions assessing the stock accordingly.

The present suit to recover the assessment upon appellant's shares was brought in the Superior Court of Wilkes County, and its judgment in favor of the respondent was affirmed by the state Supreme Court. Appellant, by his pleadings, challenged the constitutionality of the statute upon the ground, relied on here, that § 1, by its failure to provide for notice to stockholders of the special meeting for the purpose of levying the assessment, denies due process of law guaranteed by the Fourteenth Amendment.

Petitioner thus seeks to raise the question whether one who acquires stock in a corporation, notice of whose meetings is dispensed with by state law, can, for that reason alone, invoke the due process clause to set aside corporate action adversely affecting his interest as a stockholder.

But no such question is presented. Section 1 makes it the duty of the officers and directors of the bank, in the contingencies named,

to "call a special meeting of the stockholders for the purpose of making an assessment". The statute does not prescribe that the meeting be called without notice. Petitioner points to no provision of the Georgia statutes or of the charter or by-laws of the bank dispensing with notice, nor to any decision of the Supreme Court holding that the statutory duty to "call" a stockholders meeting can be performed without reasonable notice to stockholders of the time and place of meeting. Even when there is no provision, in statute or by-laws, for notice, it has been held that common law principles require corporate meetings to be called by reasonable notice to stockholders. See *Stow* v. *Wyse*, 7 Conn. 214; *Wiggin* v. *First Freewill Baptist Church*, 8 Metc. (Mass.) 301, 312; *Stevens* v. *Eden Meeting House Society*, 12 Vt. 588, 589. That, we think, in the absence of a controlling decision of the highest court of Georgia, must be taken to be the implied requirement of § 1.

Notice was in fact given in the present case, as appears by the agreed statement of facts, by mailing it fifteen days before the meeting, addressed to petitioner at his address last known to the bank. It does not appear whether he received the notice. In the face of this record, we cannot assume either that notice was not required by the law of the state or that that actually given was insufficient.

In assailing the constitutionality of a state statute the burden rests upon appellant to establish that it infringes the constitutional guarantee which he invokes. If the state court has not otherwise construed it and it is susceptible of an interpretation which conforms to constitutional requirements, doubts must be resolved in favor of, and not against the state. See No. 454, *Corporation Commission of Oklahoma, etc.* v. *Lowe, etc.*, decided May 19, 1930; *South Utah Mines* v. *Beaver County*, 262 U. S. 325, 331.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.